

# CHAPTER 7

## SOLICITATION AND AWARD PHASE

SOLICITATION	EVALUATION Sealed Bidding      Negotiation		AWARD
<b>Terms and Conditions</b> Contract Types Letter Contracts Contract Financing Use of Government Property And Supply Sources Need For Bonds Solicitation Preparation  <b>Soliciting Offers</b> Publicizing Proposed Procurements Preaward Inquiries Prebid/Preproposal Conferences Amending Solicitations Cancelling Solicitations	<b>Bid Evaluation</b> Processing Bids Time Extensions For Bids Late Offers Bid Prices Responsiveness	<b>Proposal Evaluation</b> Processing Proposals Technical Evaluation Price Objectives Cost and Pricing Data Audits Cost Analysis Evaluating Other Terms & Conditions Competitive Range  <b>Discussions</b> Factfinding Negotiation Strategy Conducting Negotiations	<b>Selection for Award</b> Mistakes In Offers Responsibility Subcontracting Goals Preparing Awards  <b>Executing Awards</b> Award Debriefing  <b>Protests</b> Protests  <b>Fraud</b> Fraud And Exclusion

*Exhibit 7-1. Solicitation and Award Phase of the Federal Acquisition Process.*

### Learning Objectives

The learning objectives for this chapter are located at the front of the section or subsection to which they apply and are highlighted with gray shading. After completion of this chapter, you will be expected to know all the highlighted learning objectives for this chapter.

*Exhibit 7-2. Learning Objectives.*

## CHAPTER INTRODUCTION

In the Solicitation and Award Phase, the Government solicits offers and quotes, evaluates offers and quotes received, and awards contracts.

### 7.1 SOLICITATION

SOLICITATION	EVALUATION Sealed Bidding      Negotiation		AWARD
<b>Terms and Conditions</b>			
Contract Types			
Letter Contracts			
Contract Financing			
Use of Government Property And Supply Sources			
Need For Bonds			
Solicitation Preparation			
<b>Soliciting Offers</b>			
Publicizing Proposed Procurements			
Preaward Inquiries			
Prebid/Preproposal Con- ferences			
Amending Solicitations			
Cancelling Solicitations			

*Exhibit 7-3. The Solicitation. (The First Function of the Solicitation-Award Phase).*

- Define solicitation, contract clause, and solicitation provision.
- List the steps in soliciting offers.

Solicitations	<p>Solicitations consist of (a) a draft contract and (b) solicitation provisions. The draft contract includes a “Schedule” —which describes the requirement—and Contract Clauses.</p> <p>The Invitation for Bids (IFB), Request for Proposals (RFPs), and Request for Quotations (RFQ) are solicitation documents. Contracting officers use IFBs when contracting by the sealed bidding method, RFPs when contracting by the negotiation under FAR Part 15; and RFQs when using the simplified procedures of FAR Part 13.</p>
Contract Clauses	Contract clauses state the rights and obligations of parties to the contract following award.
Solicitation Provisions	<p>Solicitation provisions tell offerors how to prepare and submit offers. Solicitation provisions also describe the evaluation of offers and the offeror's right to protest award. Provisions apply only before contract award and are not included in the resulting contract.</p>
Steps in Soliciting Offers	<p>There are two steps in soliciting offers.</p> <ol style="list-style-type: none"> <li>1. Selecting terms and conditions for the solicitation, given presolicitation decisions on such matters as the applicability of FAR 12, solicitation format, results of market research and acquisition histories. In this text/reference, sections 7.1.1.1 through 7.1.1.5 identify some of the clauses and provisions that COs consider for solicitations—namely, those relating to: <ul style="list-style-type: none"> <li>• Contract types</li> <li>• Letter contracts</li> <li>• Contract financing</li> <li>• Use of Government property and supply sources</li> <li>• Bonds</li> </ul> </li> <li>2. Soliciting offers, including: <ul style="list-style-type: none"> <li>• Publicizing the requirement.</li> <li>• Answering inquiries about the requirement.</li> <li>• Conducting prebid/preproposal conferences.</li> <li>• Determining whether to amend or cancel the solicitation.</li> </ul> </li> </ol>

**7.1.1 Terms and Conditions****7.1.1.1 Contract Types**

FAR Part 16

- List the differences between fixed-price contracts and cost reimbursement contracts.
- State how the type of contract affects risk.

**Types of Contracts**

From the contractors' perspective, compensation is perhaps the most important part of a contract. Most Federal contracts are Fixed Price. That is, the contract stipulates a fixed sum of money to be paid the contractor as consideration for performance. Other contracts are Cost Reimbursable. That is, the Government reimburses the contractor for the allowable incurred costs of performance. In practice, COs use almost every conceivable variation on these two basic approaches to compensating contractors, including:

- Firm Fixed Price contracts.
- Fixed Price contracts with Economic Price Adjustment.
- Fixed Price Award Fee contracts.
- Fixed Price Redeterminable contracts.
- Fixed Price Incentive contracts.
- Cost Plus Fixed Fee contracts.
- Cost Plus Incentive Fee contracts.
- Cost Plus Award Fee contracts.
- Cost and Cost Sharing contracts.
- Time and Materials and Labor Hour contracts.
- Combinations of two or more of the above compensation arrangements in the same contract.

Beyond compensation, another issue is when, where, and in what quantity the Government may order deliverables under the contract. Most Federal supply contracts specify fixed quantities, delivery points, and delivery dates. However, COs also employ a variety of Indefinite Delivery contracts when the Government needs flexibility in ordering after award.

These contract types are described in Exhibit 7-4. For each type of contract, Exhibit 7-4 also identifies (1) the principal risk that it has been designed to mitigate, and (2) limitations in the FAR on its use.

## Selecting a Contract Type

COs solicit Firm Fixed Price offers or quotations when the risks involved are minimal or improbable. Otherwise, the CO will seek an agreement with a vendor on a contract type and price (or estimated cost and fee) that will result in a reasonable level of risk while providing the firm with the greatest incentive for efficient and economical performance. To select a contract type, the CO must therefore (1) analyze risks inherent in the acquisition, (2) identify the type of contract that would best mitigate the risk or risks at issue, and (3) ascertain whether that contract type would be proper under the circumstances, given any limitations on its use.

In performing those steps, COs consider such factors as the:

- Extent of competition for the requirement.
- Willingness of offerors to compete on a fixed price basis.
- Degree of uncertainty in estimating each element of cost.
- Type and complexity of the requirement.
- Urgency of the requirement.
- Period of performance or length of production run.
- The contractor's technical and financial capability to perform.
- Adequacy of the contractor's accounting system.
- The impact of concurrent contracts on the risks of performing the proposed work.
- Extent and nature of proposed subcontracting.
- Potential impact on the rights and obligations of the contracting parties.

## Clauses and Provisions

When sealed bidding is the method of procurement or the acquisition is for commercial items, the CO may solicit offers/quotations based on one of two compensation arrangements: (1) Firm Fixed Price (FFP) or (2) Fixed Price with Economic Price Adjustment (FPEPA). The CO may also solicit any type of ordering arrangement. Having chosen the type of contract to solicit, the CO selects or develops related clauses (e.g., 52.216-18 through 216-22 for indefinite delivery; and 52.232-1 for fixed price payments) and solicits quotations/offers against those clauses.

For other acquisitions under FAR Part 13 or 15, the CO may solicit any type of contract. Using the clause at FAR 52.216-1, the CO informs offerors that the Government contemplates award of the specified type of contract. The CO also incorporates the clauses in the solicitation that are entailed by the type of contract being solicited. However, offerors may propose use of a different type of contract.

## CONTRACT TYPES

## CONTRACT FEATURES

	<b>FIRM FIXED PRICE (FFP)</b>	<b>INDEFINITE DELIVERY (ID)</b>	<b>FIXED PRICE ECON. PRICE ADJUSTMENT (FPEPA)</b>	<b>FIXED PRICE AWARD FEE (FPAF)</b>	<b>FP PROSPECTIVE RE-DETERMINABLE (FPPRD)</b>
<b>PRINCIPAL RISK TO BE MITIGATED</b>	None. Costs can be estimated with a high degree of confidence. Thus, the contractor assumes the risk.	At the time of award, delivery requirements are not certain. Use: <ul style="list-style-type: none"> <li>Definite Quantity (if the required quantity is known and funded at the time of award).</li> <li>Indefinite Quantity (if the minimum quantity required is known and funded at award.)</li> <li>Requirements (if no commitment on quantity is possible at award.)</li> </ul>	Market prices for required labor and/or materials are likely to be highly unstable over the life of contract.	Acceptance criteria are inherently judgmental, with a corresponding risk that the end user will not be fully satisfied.	Costs of performance can be estimated with confidence only for the first year of performance.
<b>USE WHEN</b>	<ul style="list-style-type: none"> <li>The requirement is well-defined.</li> <li>Contractors are experienced in meeting it.</li> <li>Market conditions are stable.</li> <li>Financial risks are otherwise insignificant.</li> </ul>	<ul style="list-style-type: none"> <li>"Per unit" price.</li> <li>Performance period.</li> <li>Ordering activities and delivery points.</li> <li>Maximum or minimum limit (if any) on each order.</li> <li>Extent of each party's commitment on quantity.</li> </ul>	The market prices at risk are severable and significant. The risk stems from industry-wide contingencies beyond the contractor's control. The dollars at risk outweigh the administrative burdens of an FPEPA.	Judgmental standards can be fairly applied by an Award Fee panel. The potential fee is large enough to both: <ul style="list-style-type: none"> <li>Provide a meaningful incentive.</li> <li>Justify the administrative burdens of an FPAF.</li> </ul>	The Government needs a firm commitment from the contractor to deliver the supplies or services during subsequent years. The dollars at risk outweigh the administrative burdens of an FPPRD.
<b>ELEMENTS</b>	A firm fixed price for each line item or one or more groupings of line items.	<ul style="list-style-type: none"> <li>"Per unit" price.</li> <li>Performance period.</li> <li>Ordering activities and delivery points.</li> <li>Maximum or minimum limit (if any) on each order.</li> <li>Extent of each party's commitment on quantity.</li> </ul>	A fixed price, ceiling on upward adjustment, and a formula for adjusting the price up or down based on: <ul style="list-style-type: none"> <li>Established prices.</li> <li>Actual costs of the labor or materials.</li> <li>Labor or material indices.</li> </ul>	<ul style="list-style-type: none"> <li>A firm fixed price.</li> <li>Standards for evaluating performance.</li> <li>Procedures for calculating a "fee" based on performance against the standards.</li> </ul>	<ul style="list-style-type: none"> <li>Fixed price for the first period.</li> <li>Proposed subsequent periods (at least 12 months apart).</li> <li>Timetable for pricing the next period(s).</li> </ul>
<b>THE CONTRACTOR MUST</b>	Provide an acceptable deliverable at the time, place, and price specified in the contract.	Provide acceptable deliverables at the per unit price when and where specified in each order, within the contractual ordering limits.	Provide an acceptable deliverable at the time and place specified in the contract at the adjusted price.	Perform at the time, place, and the price fixed in the contract.	Provide acceptable deliverables at the time and place specified in the contract at the price established for each period.
<b>CONTRACTOR INCENTIVE</b> <i>(other than maximizing Goodwill)<sup>2</sup></i>	Generally makes a dollar of profit for every dollar that costs are reduced.	Generally makes a dollar of profit for every dollar that per unit costs are reduced.	Generally makes a dollar of profit for every dollar that costs are reduced.	Generally makes a dollar of profit for every dollar that costs are reduced; and earn a fee for satisfying the performance standards.	For the period of performance, makes a dollar of profit for every dollar that costs are reduced.
<b>TYPICAL APPLICATION</b>	Commercial supplies and services.	Long term contracts for commercial supplies and support services.	Long term contracts for commercial supplies during a period of high inflation.	Installation support services.	Long term production of spare parts for a major system.
<b>PRINCIPAL LIMITATIONS (IN PARTS 16, 32, 35, AND 52 OF THE FAR)</b>	Generally not appropriate for R&D.	Per unit price may be FFP, FPEPA, FPPRD, or catalog/ market based. If a Req. contract, must buy it from that contractor.	Must be justified.	Must be negotiated.	Must be negotiated. Contractor needs an adequate accounting system. Prompt re-determinations.
<b>VARIANTS</b>	Firm Fixed Price Level of Effort				Retroactive Re-determination

<sup>1</sup>The amount of the award fee is not subject to the Disputes Clause.<sup>2</sup>Goodwill being the value of the name, reputation, location and other intangible assets of a firm.

**CONTRACT TYPES**

<b>FIXED PRICE INCENTIVE (FPI)</b>	<b>COST PLUS FIXED FEE (CPFF)</b>	<b>COST PLUS INCENTIVE FEE (CPIF)</b>	<b>COST PLUS AWARD FEE (CPAF)</b>	<b>COST OR COST SHAR- ING (C/CS)</b>	<b>TIME &amp; MATERIALS (T&amp;M)</b>
Labor or material re- quirements for the work are moderately uncertain. Hence, the Government assumes part of the risk.	Labor hours, labor mix, and/or material requirements (among other things) necessary to perform are highly uncertain and speculative. Hence, the Government assumes the risks inherent in the contract—benefiting if the actual cost is lower than the expected cost; losing if the work cannot be completed within the expected cost of performance. Some cost type contracts include procedures for raising or lowering the fee as an incentive for the contractor to perform at lower cost and/or attain performance goals.				
A ceiling price can be es- tablished that covers the most probable risks in- herent in the nature of the work. The proposed profit sharing formula would motivate the contractor to control costs and meet other ob- jectives.	Relating fee to performance (e.g., to actual costs) would be unwork- able or of marginal utility.	An objective rela- tionship can be estab- lished between the fee and such measures of performance as actual costs, delivery dates, performance bench- marks, and the like.	Objective incentive tar- gets are not feasible for critical aspects of per- formance. Judgmental standards can be fairly applied. <sup>1</sup> The potential fee would provide a meaningful incentive.	<ul style="list-style-type: none"> <li>The contractor expects substan- tial compensat- ing benefits for absorbing part of the costs and/ or foregoing fee, or</li> <li>The vendor is a nonprofit entity.</li> </ul>	Costs are too low to justify an audit of the contractor's indirect expenses.
<ul style="list-style-type: none"> <li>A ceiling price.</li> <li>Target cost.</li> <li>Target profit.</li> <li>Delivery, quality, and/or other performance targets (optional)</li> <li>A profit sharing formula.</li> </ul>	<ul style="list-style-type: none"> <li>Target cost.</li> <li>A fixed fee.</li> </ul>	<ul style="list-style-type: none"> <li>Target cost.</li> <li>Performance targets (optional)</li> <li>A minimum, maximum, and target fee.</li> <li>A formula for adjusting fee based on actual costs and/ or performance.</li> </ul>	<ul style="list-style-type: none"> <li>Target cost.</li> <li>Standards for evalu- ating performance.</li> <li>A base and maxi- mum fee.</li> <li>Procedures for ad- justing "fee", based on performance against standards.</li> </ul>	<ul style="list-style-type: none"> <li>Target cost.</li> <li>If CS, an agree- ment on the Government's share of the cost.</li> <li>No fee.</li> </ul>	<ul style="list-style-type: none"> <li>A ceiling price.</li> <li>A per hour labor rate that also covers overhead and profit.</li> <li>Provisions for re- imbursing direct material costs.</li> </ul>
Provide an acceptable de- liverable at the time and place specified in the contract at or below the ceiling price.	Make a good faith effort to meet the Government's needs within the estimated cost in the Schedule.				Make a good faith ef- fort to meet the Gov- ernment's needs within the "ceiling price."
Realizes a higher profit by completing the work below the ceiling price and/or by meeting objec- tive performance targets.	Realizes a higher rate of return (i.e., fee divided by to- tal cost) as total cost decreases.	Realizes a higher fee by completing the work at a lower cost and/or by meeting other objective performance targets.	Realizes a higher fee by meeting judgmental per- formance standards.	If CS, shares in the cost of providing a deliverable of mu- tual benefit.	
Production of a major system based on a proto- type.	Research study.	Research and devel- opment of the prototype for a major system.	Large scale research study.	Joint research with educational institu- tions.	Emergency repairs to heating plants and air- craft engines.
Must be justified & negoti- ated. Contractor needs an adequate accounting sys- tem. Targets must be supported by cost data.	Must be negotiated. Must be justified. The contractor must have an adequate accounting system. The Government must closely monitor the contractor's work to ensure use of efficient methods and cost controls. There are statutory and regulatory limits on the fees that may be negotiated. Must include the applicable "Limitation of Cost" clause at FAR 52.232-20 through 23.				Must be justified and negotiated. The Gov- ernment must closely monitor the contrac- tor's work.
Firm or Successive Tar- gets	Completion or Term				Labor Hour

*Exhibit 7-4. Contract Types.*

Agreements are not contracts but are negotiated instruments for use during a set period of time between a contracting activity and a contractor. There are two types of Agreements, shown in exhibit 7-5 below.

#### TYPES OF AGREEMENTS

- **Basic Agreements (BAs)** are written instruments of understanding that convey contract clauses applicable to future contracts between the parties. BAs are useful when a number of contracts may be awarded to a contractor and agreement can be reached on a number of critical terms and conditions for incorporation in most or all of the impending contracts.
- **Basic Ordering Agreements (BOA)** include negotiated clauses, but also describe the types of supplies or services to be acquired and the methods for pricing, issuing, and delivering future contracts (called “orders” for the purpose of a BOA). By establishing the “ground rules,” the placing of orders for supplies and services may be expedited as anticipated requirements for the supplies and services materialize.

*Exhibit 7-5. Types of Agreements.*

#### ***What Type of Contract for Building a House?***

*After the Livingstons decided to go ahead with their “plan”, they had to determine the type of contract to use. Because the architect would prepare detailed plans, thus eliminating uncertainties as to the work to be performed, a fixed price type of contract seemed appropriate:*

- *They considered using an incentive provision that would reward the builder for early completion but felt that the planned delivery schedule was realistic and the builder should have no trouble meeting it.*
- *A labor-hour contract was ruled out because they did not want to have to acquire and furnish building materials to the builder.*
- *They ruled out a time-and-materials type of contract because that would not require the builder to complete the work within a fixed amount of time— besides, the work to be done was clearly described.*

*Their final decision was to use a firm-fixed-price type contract. That way, they limit their liability because the builder must complete the work for the agreed upon price.*



### 7.1.1.2 Letter Contracts

FAR 16.603

- Define the term letter contract.
- Identify situations when a letter contract is appropriate.

#### Definition

A letter contract is a written preliminary contractual instrument that authorizes the contractor to begin work immediately.

#### When Appropriate

A letter contract may be used when:

- The Government's needs are such that the contractor must be given a binding commitment so that work can begin immediately.
- Negotiation of a definitive contract is not possible in time to meet the requirement.

Clearly, making a contractual commitment before all the terms and conditions are known can pose some risks. Nevertheless, there are occasions, such as during national emergencies, when time is of the essence and a letter contract is therefore necessary.

A letter contract:

- May not be used unless the agency head or designee determines that no other contract is suitable.
- Shall not be entered into without competition if competition is otherwise required.
- Shall not be amended to satisfy a new requirement unless that requirement is inseparable from the existing letter contract.

#### Clauses and Provisions

When it is necessary to use a letter contract, it should:

- Be as complete and definite as possible under the circumstances.
- Include a maximum liability clause.
- Include a time-table for definitization (usually within 180 days or before completion of 40 percent of the work, whichever occurs first).
- If awarded based on price competition, include an overall ceiling price to avoid being a "blank check."

## CHAPTER 7

### 7.1.1.3 Contract Financing

FAR Part 32

- Identify situations when solicitations may provide for contract financing.
- List the types of financing.
- Determine whether to provide for contract financing when requested to do so by an offeror.

#### Financing Defined

Financing refers to payments made to a contractor before supplies have been delivered or services rendered. The CO determines whether financing is necessary and the type of financing to establish in the contract. This information can be specified in the solicitation document.

#### When Appropriate

The contractor's private financing, such as company funds or borrowed capital, may be inadequate or be so costly as to be unaffordable. Therefore, contractors may need financing to cover upfront expenses for:

- Materials and equipment.
- Labor.
- Subcontracts.
- Overhead expenses.
- Travel and per diem.

The longer the term of the contract, the more the contractor will be concerned about its ability to maintain the necessary cash flow during contract performance. To help with this cash flow problem, and as a means of attracting contractors, the Government assists contractors with their financing.

#### Financing Terms in Contracts for Commercial Items

FAR Part 32.2

Two basic types of financing are available when contracting for commercial items. They are:

- 1) **Commercial advance payments** - Payments made before any performance of work under the contract. Commercial advance payments may **not** total more than 15 percent of the contract price.
- 2) **Commercial interim payments** - Payments made after the contractor has begun work under the contract but prior to acceptance.

Commercial advance and interim payments are not subject to the interest penalty provisions of the Prompt Payment Act. Instead, agencies are required to establish payment times for such financing payments.

## SOLICITATION AND AWARD PHASE

It is the responsibility of the contractor to provide all resources needed for performance of the contract. Thus, for purchases of commercial items, financing of the contract is normally the contractor's responsibility.

However, in some markets the provision of financing by the buyer is a commercial practice. In these circumstances, the contracting officer may include appropriate financing terms in contracts for commercial purchases when doing so will be in the best interest of the Government. Therefore, when performing market research, be alert for signs that buyers customarily finance sellers. If buyer financing appears to be a customary market practice, ascertain the:

- Extent to which other buyers provide contract financing for purchases in that market.
- Overall level of financing normally provided.
- Amount or percentages of any payments equivalent to commercial advance payments (per FAR §32.202-2).
- Basis for any payments equivalent to commercial interim payments (as defined at FAR §32.202-2), as well as the frequency, and amounts or percentages.
- Methods of liquidation of contract financing payments and any special or unusual payment terms applicable to delivery payments. [FAR §32.202-3]

When performing market research, likewise be alert for signs that sellers customarily finance buyers. Since the Government cannot accept financing from sellers, the Government price should be correspondingly less than commercial prices that are based on seller financing. The Government pays on delivery.

Financing Terms in Contracts for Non-Commercial Items

FAR Part 32.1

Unless otherwise authorized by agency regulation, contract financing may be provided only in contracts for non-commercial items:

- With small business contractors when the contract price will be greater than the simplified acquisition threshold.
- With other than small business contractors when the contract price will be \$1 million or more, or for a group of contracts, whose prices are greater than the simplified acquisition threshold, that total \$1 million or more.

For non-commercial contracts, the following methods of financing can be provided (listed below in order of preference.

1. **Customary Progress Payments**—Payments made under a fixed price contract on the basis of costs incurred or on physical progress. When based on costs, the customary rate of payment is usually 80% of costs incurred or, for small businesses, 85%. For construction, the rate is usually 90% for work completed. Progress payments based on a percentage or stage of completion are authorized by the statutes cited in FAR 32.101. Customary progress payments being by far the most commonly used method of financing.

Note that progress payments differ from "partial payments," in that the latter are payments for items received and accepted by the Government when the contractor has shipped part of the order. Progress payments, on the other hand, are made to the contractor for work still in progress.

2. **Loan Guarantees**—Generally, a guarantee to a lending institution that the Government will stand behind loans to the contractor. These guarantees are made by Federal Reserve banks on behalf of designated guaranteeing agencies. Seven agencies (DoD, Energy, Commerce, Interior, Agriculture, GSA, NASA) are authorized to guarantee loans for contract performance.
3. **Unusual Progress Payments**—Generally, payments at a rate higher than 80% of costs incurred (or higher than 85% for small business concerns).
4. **Performance-Based Payments**—These are not payments for accepted items (i.e., not to be confused with partial payments) but rather are based on:
  - Performance measured by objective, quantifiable methods,
  - Accomplishment of defined events, or
  - Other quantifiable measures of results.

This type of payment can only be used if certain conditions exist. See FAR 32.10 for limitations.

5. **Advance Payments**—Payments made to the contractor in advance of any incurrence of cost. Advance payments are used rarely (i.e., when start-up costs are exceptionally high).

Clauses and Provisions	If progress payments are to be made available, the CO incorporates the provision at FAR 52.232-13. In sealed bidding, the progress payments may be made available only for small businesses, by incorporating the provision at FAR 52.232-14, or may be ruled out altogether by the provision at FAR 52.232-15. If progress payments are to be available, the CO also incorporates the progress payment clause at FAR 52.232-16. For advance payments, the CO inserts the clause at FAR 52.232-12.
Requests from Offerors	When the solicitation makes progress payments available, the offeror may request the progress payments following award in sealed bidding. In negotiated procurements, the contractor can request progress payments (or any other form of financing) during discussions whether or not the CO incorporated the provision at FAR 52.232-13. In that case, the CO evaluates the firm's need for financing and reaches a decision on the request. If financing is extended, the CO takes measures to protect the Government's interests and receive consideration for the cost of the capital being furnished.

#### 7.1.1.4 Use of Government Property

- Identify types of GFP.
- State reasons for making GFP available to contractors.

#### Government Furnished Property

FAR Part 45

Contractors are ordinarily expected to furnish all property necessary to perform the work of the contract. When in the Government's best interests, however, the CO can authorize a contractor to use Government-Furnished Property (GFP). For example:

- The Government may be the only source of supply for an item that is to be used in connection with contract performance (e.g., certain nuclear products), or
- The cost of furnishing Government property to a contractor may be less than having the contractor furnish it.

Examples of GFP that may be provided are:

- Facilities.
- Material.
- Motor Vehicles.
- Special Tooling.
- Special Test Equipment.

## CHAPTER 7

In some cases, the CO may authorize contractors to acquire property for the Government. While the contractors will use this property in performing the work of the contract, title to such property ultimately passes to and is vested in the Government.

### Clauses and Provisions

When property is to be furnished, describe the property in the Schedule or specifications and incorporate the clauses prescribed in FAR Part 45. The CO may also solicit offers predicated either on use of Government property or on the use of equivalent contractor-furnished property—as one way of deciding whether the Government would incur a lower total cost by furnishing the property as GFP.

### Supply Sources

In addition to furnishing GFP, the CO may, if it is in the Government's interest, authorize contractors to use:

- Interagency motor pool vehicles (and related services).
- Government supply sources, such as:
  - Stocks maintained by certain agencies (e.g. helium from the Department of the Interior).
  - Federal supply schedules (e.g., GSA indefinite-delivery contracts).

Generally, the use of government supply sources and interagency motor pools is limited to cost reimbursement type contracts.

### 7.1.1.5 Bonds

FAR Part 28
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- Define the term bond.
- Describe the different types of bonds.
- Identify situations in which a bond is needed.
- Explain the impact of not requiring a bond.

<b>TYPES OF BONDS</b>			
	<b>Bid Guarantee</b>	<b>Performance Bond</b>	<b>Payment Bond</b>
<b>Purpose</b>	Ensures bidder will: - Not withdraw bid. - Execute contract. - Furnish additional bonds required.	Secures performance and fulfillment of the contractor's obligation under the contract.	Assures payment as required by law to all persons supplying labor or materials to the prime contractor.
<b>Value</b>	20% of the bid price but not more than \$3 million	100% of contract.	Varies.
<b>When Required</b>	When performance bonds, or performance and payment bonds, are required.	For construction contracts in U.S. over \$25,000. In other than construction contracts, when deemed necessary by the CO to protect the Government from undue market risks.	For construction contracts in U.S. over \$25,000. In other than construction contracts, when a performance bond is required and the CO believes a payment bond is also necessary.
<b>Examples of Risks That Bonds Are Meant To Mitigate</b>		That the Contractor might not complete work.	That the Contractor might fail to pay subcontractors.

*Exhibit 7-6. Types of Bonds.***Definition**

A **bond** is a written instrument executed by a bidder or contractor and a surety to assure fulfillment of an obligation to the Government. The most commonly used types of bonds are shown in Exhibit 7-6. The FAR also provides for advance payment and patent infringement bonds.

Incorporate the clauses prescribed in FAR Part 28 and the applicable forms (e.g., SF 25). Also specify:

- The requirement for the bond(s);
- The penal sum of each bond; and
- The deadline for submitting acceptable bonds.

#### 7.1.1.6 Solicitation

- Identify the various types of solicitation formats.
- Identify the elements of the solicitation document.

#### Format

After deciding such business-related issues as the type of contract and the need for bonds, COs assemble the solicitation of offers or quotations (i.e., the RFQ, IFB or RFP). Solicitations typically have four basic parts:

FAR 14.201 & 15.406

- Contract Schedule (i.e., the requirement).
- Contract Clauses.
- List of Documents and Attachments.
- Representations and Instructions (i.e., solicitation provisions).

Contracting officers can solicit offers and quotations electronically and permit contractors to submit their responses electronically. When preparing a solicitation authorizing electronic offers or quotations, COs specify the electronic commerce method(s) that vendors may use. COs also may consider the impact of electronic data interchange on the time reasonably needed by vendors to prepare and submit their responses—electronic commerce should accelerate this process.

#### Formats, Clauses, and Provisions for Acquiring Commercial Items

When acquiring commercial items, COs use either Standard Form (SF) 1449 (whether using the paper form or an on-screen FACNET or other replica of the form) or the new combined CBD synopsis/solicitation (when the combined synopsis/solicitation does not exceed 12,000 textual characters).

Far Part 12

FAR Part 12 requires only two provisions and two clauses for use with these two formats. Notwithstanding the provision and clause prescriptions in any other part of the FAR, NO other provisions and clauses are required for the SF 1449. The provisions and clauses are as follows.



## SOLICITATION AND AWARD PHASE

- 52.212-1, Instructions to Offerors - Commercial.
- 52.212-3, Offeror Representations and Certifications - Commercial Items.
- 52.212-4, Contract Terms and Conditions - Commercial Items. This clause reflects standard commercial terms and includes language parallel to that in the Uniform Commercial Code on such matters as implied warranties.
- 52.212-5, Contract Terms and Conditions Required To Implement Statutes Or Executive Orders - Commercial Items.

In their FAR supplements, agencies may require use of other provisions and clauses only as necessary to reflect agency unique statutes applicable to the acquisition of commercial items or as may be approved by the Senior Procurement Executive or representative on the FAR Council.

Based on market research, contracting officers may tailor the provision at 52.212-1 and the clause at 52.212-4 to incorporate customary terms and conditions of the commercial market for the requirement. The FAR encourages tailoring especially if the commercial terms and conditions would be appropriate in concluding a business arrangement, satisfactory to both parties, and not otherwise precluded by law or executive order. However, contracting officers may NOT tailor terms and conditions of 52.212-4 that implement statutory requirements (e.g., assignments, disputes, payment, invoices, other compliances, and compliance with laws unique to Government contracts).

Contracting officers may, at their discretion, incorporate other provisions and clauses — provided the additional provisions and clauses are consistent with customary commercial practice. For example, contracting officers may include provisions or clauses related to the use of:

- Indefinite delivery contracts (FAR §16.505).
- Options (§17.208).
- Recovered materials (Part 23). (§12.301(d))

## CHAPTER 7

### Formats, Clauses, and Provisions for Acquiring Non-Commercial Items

#### FAR Part 52

When acquiring non-commercial items under FAR Part 14 or 15 procedures, COs generally follow the Uniform Contract Format (Exhibit 7-7) in assembling the solicitation document.

Solicitations for non-commercial items generally contain hundreds of provisions and clauses. For the most part, these are drawn from standard clauses and provisions in FAR Part 52, the agency's supplemental regulations, the activity's "clause book", and other such sources. Several FAR clauses and provisions must appear in all Federal solicitations (i.e., "boilerplate"). Others, generally classified as "required when applicable" or "optional", result from the CO's decisions on such matters as the:

- Method of procurement.
- Type of requirement (e.g., supply, service, construction, etc.).
- Type of contract to solicit.

To identify applicable FAR clauses and provisions, COs turn to the "Solicitation Provisions and Contract Clauses Matrix" in section 52.3 of the FAR.

**UNIFORM CONTRACT FORMAT**

FAR 14.201 and 15.406

Section	Title	Examples or Purpose of Section
<b>Part 1 - Schedule</b>		
A	Solicitation/Contract Form	The first page of the solicitation, (e.g., SF 33), with general instructions on when and where to submit offers and blocks for the offeror's name and address.
B	Supplies or Services and Prices	Lists the supplies or services being acquired by line item and quantity, with blocks for offerors to fill in prices.
C	Description/Specifications/Work Statement	Supplements the brief description in Section B to fully describe the supplies or services to be acquired.
D	Packaging and Marking	Specifies how the item must be packaged, packed, preserved, and/or marked, as appropriate.
E	Inspection and Acceptance	Specifies when, where, and how the deliverable will be inspected and accepted, as well as the contractor's obligations for quality assurance.
F	Deliveries or Performance	Specifies when, where, and how the item(s) must be delivered, or when and where the services must be rendered.
G	Contract Administration Data	Used for accounting and appropriation data and for additional contract administration information or instructions, such as the name and location of the Government activity that will (1) administer the contract and (2) make payments under the contract.
H	Special Contract Requirements	Used for requirements that occur on a contract-by-contract basis (e.g., special security requirements pertaining to classified materials).

*Exhibit 7-7. Uniform Contract Format.*

UNIFORM CONTRACT FORMAT		
Section	Title	Examples or Purpose of Section
<b>Part II - Contract Clauses</b>		
I	Contract Clauses	Includes or references most clauses that will apply to work under the contract, including such matters as contract execution and interpretation, bonds, type of contract, set asides, subcontracting, foreign sourcing, labor management relations, environmental protection and occupational safety, patents and rights in data, payment, taxes, property, warranties, modifications, termination, and disputes.
<b>Part III - List of Attachments</b>		
J	List of Documents, Exhibits, or other attachments	The CO lists the title, date, and page count for any attachments.
<b>Part IV - Representations and Instructions</b>		
K	Representations, Certifications, and Other Statements of Offerors	Used for obtaining certifications (e.g., of Independent Price Determination, Nonsegregated Facilities, Buy American, Clean Air and Water, Drug-Free Workplace, etc.), representations, and other data from the offerors.
L	Instructions, Conditions, and Notices to Offerors	Used to instruct offerors on preparing and submitting the offers, including such matters as bid samples, descriptive literature, amendments, late submissions, failure to submit, and the like. Also used to notify offerors on such matters as preaward inquiries, award, and service of protests.
M	Evaluation for Award	Tells prospective offerors how offers will be evaluated (e.g., price-related and technical factors).

Exhibit 7-7. Uniform Contract Format (Continued).

## 7.1.2 Soliciting Offers

### 7.1.2.1 Publicizing Proposed Procurements

- Describe CBD synopses.
- Describe other methods of publicizing.

#### Purpose

FAR Part 5

COs are required to publicize proposed contract actions prior to issuance of the solicitation to increase competition, broaden industry participation in meeting Government requirements, and assist small, small disadvantaged, and woman-owned small business concerns in obtaining contracts and subcontracts.

#### Synopsizing

The generally prescribed and most common way to publicize is the placement of a synopsis in the **Commerce Business Daily (CBD)**. A synopsis is a brief description of the supplies and services to be acquired by contract. It also provides prospective offerors with information on obtaining a copy of the solicitation from the responsible contracting office. Generally, the requirement must appear in the CBD at least 15 days before the CO releases the solicitation to vendors. If using the combined CBD synopsis/solicitation, the solicitation is considered “issued” on the date of the CBD publication.

The CBD is the public medium for announcing proposed contract actions, contract awards, and other procurement information. The CBD is issued every business day by the Department of Commerce. Each edition contains approximately 500 to 1,000 synopses and other notices. The Department also hosts an Internet-based, on-line, searchable version of the CBD, and COs can use the Internet to post their synopses to the CBD.

#### Exceptions to the Synopsis Requirement

CBD synopses are only required for contract actions expected to exceed \$25,000. The FAR also establishes exceptions to the synopsis requirement. For instance, the FAR provides relief from the synopsis requirement when:

- The requirement is classified.
- Time does not permit the delays inherent in synopsizing.
- Ordering against a requirements contracts.
- Exercising an option.
- Using FACNET.

Section 5.202 of the FAR also establishes other exceptions to the synopsis requirement. To determine whether an exception applies to a given contract action, see that section of the FAR.

## Other Methods

COs further “publicize” the requirement by sending copies of the solicitation to potential offerors/quoters on their mailing lists (including e-mail). Where necessary to expand competition, COs may employ the methods in Exhibit 7-8.

**OTHER METHODS OF PUBLICIZING**

- Posting solicitation notices in public places (in required when the award price is expected to range between \$10,000 and \$25,000 or, in the case of Defense agencies, between \$5,000 and \$25,000). Electronic dissemination available to the public at the contracting office may be used to satisfy the public display requirement
- Periodic handouts listing proposed contracts.
- Announcements to local trade associations.
- Announcements to newspapers and other media for publication without cost (paid advertising requires special authority and is seldom used).
- Electronic bulletin boards.
- Mailing of flyers to potential suppliers listed on the Bidder’s Mailing List.

*Exhibit 7-8. Other Methods of Publicizing.*

## Response Times

When contracting for non-commercial items at prices expected to exceed the simplified acquisition threshold (SAT), COs must allow offerors at least 30 days to prepare and submit offers from the day on which the IFB or RFP was issued. Thus, when a synopsis is required, COs allot at least 45 days for soliciting offers from the day on which the synopsis was published in the CBD.

When contracting for commercial items or for any item expected to be under SAT, COs establish a solicitation response time which will afford potential offerors/quoters a reasonable opportunity to respond, considering such factors as complexity, commerciality, availability, and urgency. Another factor is use of the combined CBD synopsis/solicitation, given that the solicitation is considered “issued” on the date of the CBD publication, thereby saving 15 days.

**COMPETITION**

*After deciding upon terms and conditions for the work as the basis for soliciting offers, the Livingston's had to answer the question "How do we solicit bids on our work from reputable builders?" To solicit interest in their work, the Livingstons placed ads in a local newspaper, called builders in telephone directories, and provided fliers to wholesale building supply outlets. Six offerors contacted the Livingstons and requested more information on the work. In response to these requests, the Livingstons mailed a copy of their specifications and a printout of other desired terms and conditions of the work. The Livingstons invited each respondent to mail back a written offer.*

*Similarly, when seeking offerors to meet Government requirements, you prepare an IFB or RFP and invite companies to submit offers. Unlike the Livingstons, who only solicited offers from area builders, you are generally required to publicize your requirement and solicit offers from all interested offerors.*

## CHAPTER 7

### 7.1.2.2 Preaward Inquiries

FAR 14.211

- Define preaward inquiry.
- Describe what may be disclosed.
- Explain how responses to preaward inquiries impact on the procurement process.

**Definition** Preaward inquiries are questions and comments from prospective offerors about specifications, terms, and/or conditions in the solicitation.

**What May Be Disclosed** General information not prejudicial to other offerors (i.e. not giving one offeror an unfair advantage over any other offeror) may be furnished upon request. For example:

- Explanation of the meaning of a clause.
- Directions for locating a facility.

You can avoid most inquiries by ensuring the solicitation document is complete, clear, and unambiguous.

**Potential Impact** Refer all inquiries to the CO to avoid situations that might be viewed as improper disclosure. Technical or other information may be transmitted only by the CO or others having contractual authority. The improper release of information may result in a protest (see Section 7.4.3) that could delay or void the entire procurement.

### 7.1.2.3 Prebid and Preproposal Conferences

- Define prebid/preproposal conference.
- Explain when one is necessary.

**Definition** A prebid/preproposal conference is a meeting held before bid opening or before the closing date for submission of proposals. The CO or designated representative conducts the conference.

**When Necessary** The purpose of the prebid/preproposal conference is to:

- Provide for inspection of work site or GFP.
- Explain complicated specifications and requirements.
- Explain revisions to requirements.
- Address numerous offeror inquiries.

FAR 14.207 & 15.409



Remarks or explanations made at a conference should not be construed as amending the written solicitation.

Conferences are not a substitute for amending defective or ambiguous specifications. Sometimes, however, conferences result in the issuance of a clarifying or correcting amendment to the solicitation.

#### 7.1.2.4 Amending Solicitations

FAR 14.208 & 15.410
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- List examples of when amending a solicitation may be necessary.
- Describe how solicitations are amended.

#### When to Amend

The CO shall amend a solicitation if it is necessary to:

- Change quantity requirements, specifications, delivery requirements, or the due date for offers.
- Correct or clarify an ambiguous or defective solicitation.

Amendments are not appropriate when the overall scope of the proposed contract action has changed to the extent that the original synopsis and/or solicitation no longer validly describes the requirement. In such cases, the solicitation should generally be cancelled per section 7.1.2.5 below.

If a solicitation is amended, the CO determines if the due date for submitting offers also needs to be changed and so indicates in the amendment. The CO may use electronic data interchange to notify prospective offerors of any change to the closing date for submitting proposals.

#### How Solicitations are Amended

Amendments are prepared on Standard Form 30. With respect to IFBs, a copy of the amendment must be sent to all bidders who were provided a copy of the IFB. With respect to RFPs, a copy of the amendment must be sent:

- If before the closing date, to all offerors provided a copy of the RFP.
- If after the closing date, to all responding offerors.
- If after the competitive range has been established, to all offerors in the range.

## CHAPTER 7

### 7.1.2.5 Cancelling Solicitations

FAR 14.209, 14.404-1,  
and 15.606

- List examples of when it may be necessary to cancel a solicitation.
- Identify who is responsible for the decision to cancel.

#### When to Cancel

Solicitations should not be cancelled unless it is clearly necessary, in the public's interest, and accomplished in accordance with agency regulations. However solicitations may be cancelled for such reasons as:

- The requirement no longer exists.
- Funds are no longer available.

A solicitation might be cancelled and resolicited if the overall scope of the proposed contract has changed to the extent that the original synopsis and/or solicitation no longer validly describes the requirement.

#### Cancelling IFBs Before Opening

When the CO decides to cancel an IFB before bid opening, follow the steps in Exhibit 7-9.

#### **CANCELLING IFBs BEFORE OPENING**

FAR 14.209

- Return unopened bids.
- Send a cancellation notice to all prospective bidders, (i.e., those to which the solicitation was sent).
- Briefly explain in the cancellation notice why the solicitation was cancelled.
- Consider placing a cancellation notice in the CBD.
- Record cancellation.
- If electronic bids were authorized, do not let anyone view the electronic bids. Purge each bid and all related data received from the bidder from all data storage systems - both primary and backup.

*Exhibit 7-9. Cancelling Solicitations.*

## SOLICITATION AND AWARD PHASE

### Cancelling IFBs After Opening

FAR 14.404-1

CO's may cancel IFBs after opening the bids for reasons such as the following:

1. All otherwise acceptable bids are at unreasonable prices.
2. Only one bid was received and the Government cannot determine the reasonableness of the price bid.
3. No responsive bid has been received from a responsible bidder.
4. Bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith.
5. Inadequate or ambiguous specifications were cited in the IFB.
6. Specifications have been revised.
7. The supplies or services are no longer required.
8. The IFB did not provide for consideration of all factors of cost to the Government, such as the cost of transporting Government furnished property to bidder's plants.
9. Bids indicate that the requirement can be satisfied by a different, less expensive deliverable than solicited.
10. A cost comparison as prescribed in OMB Circular A-76 shows that performance by the Government is more economical.
11. The requirements of FAR 10.008 on the availability and identification of specifications have not been met.
12. Cancellation is clearly in the public interest for other reasons.

The steps in cancellation are roughly the same as in Exhibit 7-9, save that the bids have already been opened and that notice need be sent only to those firms that submitted bids. After cancelling, the CO has three options:

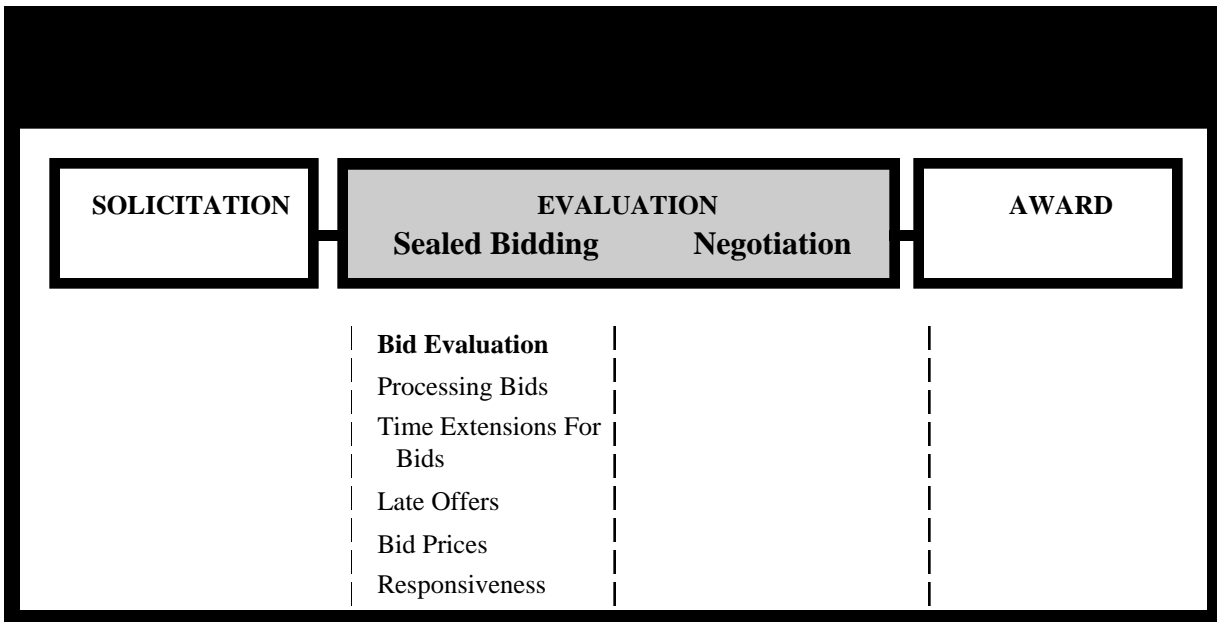
- Obtain authority to negotiate with each responsible bidder (but only if the IFB was cancelled for one of the first four reasons above).
- Resolicit.
- Forego the requirement or meet it in-house.

### Cancelling RFPs

FAR 15.606

COs cancel RFPs and RFQs and resolicit whenever the Government's requirement has changed so substantially that it warrants a complete revision of the solicitation.

## 7.2 EVALUATION (SEALED BIDDING)



*Exhibit 7-10. Evaluation (Sealed Bidding) (The Second Function of the Solicitation-Award Phase).*

### FAR Part 14

Evaluation is the second function in the Solicitation and Award Phase of the procurement process. After offers (bids or proposals) are solicited and received, they are evaluated.

Bids are evaluated differently than proposals. Hence, this section deals with bid evaluation and section 7.3 presents the process for evaluating proposals.

**7.2.1 Processing Bids**

FAR 14.4

Describe the procedures for:

- Receiving, securing, and controlling bids.
- Opening, and abstracting bids.

The essence of sealed bidding is that sealed bids are publicly opened and award is made to the lowest responsive, responsible bidder. To ensure integrity, the CO processes bids as described in Exhibit 7-11.

**PROCESSING BIDS**

- Bids received are not opened until the time set for bid opening.
- Bids are secured in a locked box, to prevent tampering. Electronic bids are stored in a “secured restricted-access electronic bid box”.
- All bids received are accounted for.
- Bids are publicly opened and read by an authorized person at the time set for bid opening.
- Prices bid are properly recorded on an “Abstract of Bids.”
- Copies of bids are available for public viewing.

*Exhibit 7-11. Processing Bids.*

**7.2.2 Time Extensions for Bids**

- Define the term bid acceptance period.
- Describe how it affects the award decision.

**Definition**

A bidder is given the opportunity to specify a date on which his/her bid expires. The time before the bid expires is called the bid acceptance period. The solicitation may establish a minimum acceptance period. Bids offering less than the minimum time are nonresponsive.

**Impact on Award Decision**

If the Government does not award the contract within the time specified for acceptance of the bid, the bid is no longer valid. If award has been delayed and the bid acceptance period of several of the lowest bids is about to expire, the CO can ask the lowest bidders whose bids have not expired to extend their bid acceptance period. The extensions must be in writing.

## CHAPTER 7

### Bid Modification or Withdrawal

Bids may be modified or withdrawn by written or telegraphic notice not later than the exact time set for opening. The “**firm bid rule**” prevents a bidder from withdrawing his or her bid between bid opening and the expiration of the bid acceptance period. The IFB may allow bidders to modify or withdraw bids by electronic massaging. If a bidder withdraws an electronic bid, purge the bid and all related data from all data storage systems - both primary and backup.

#### 7.2.3 Late Bids

FAR 14.304

- Define a late bid.

Bids received after the exact time set for opening of bids in the office designated in the IFB are late bids. Ordinarily, late bids are not accepted. However, there are very specific circumstances under which late bids may be considered for award. These circumstances are:

- The bid was sent by registered or certified mail to a contracting office in the U.S. or Canada no later than five calendar days before the specified bid receipt date. (If the offeror used *U.S. Postal Service Express Mail Next Day Service-Post Office to Addressee*, the bid can be considered if sent not later than 5:00 PM at the place of mailing two working days prior to the specified bid receipt date.)
- The bid was sent by mail (or, if authorized in the IFB, by telegram or via facsimile), and late receipt was due solely to mishandling by the Government after receipt at the Government installation.
- If submitted by an electronic commerce method authorized by the solicitation, do not consider an offer to be late if the Government received the offer “not later than 5:00 p.m. one working day prior to the date specified for receipt of” bids.

These same circumstances also apply to modifying or withdrawing bids.

**7.2.4 Bid Prices**

- Explain price-related factors and how they may affect the evaluation of a bid.
- Calculate bid prices to determine low, evaluated price for each item or group of items and compare with any “all or none” bids.
- Determine that lowest evaluated price is fair and reasonable.

**Applying the Price-related Factors**

In sealed bidding, award is made to the low bidder who is also responsive and responsible. Identification of the low bidder is usually based on:

- The price bid.
- Application of the price-related factors.
- Possibility of making award to more than one bidder.

In Chapter 6, Exhibit 6-19 lists commonly applied price related factors. To identify the lowest price bid, the CO now applies each factor to determine the *evaluated* price of the bid. Exhibit 7-12 illustrates the application of one such factor.

### APPLYING A PRICE-RELATED FACTOR

Assume the following bids for a freezer.

Bidder	Purchase Price	Energy Cost*	Evaluated Price
A	\$850	\$650	\$1,500
B	\$950	\$450	\$1,400

\*Net present value of expected energy costs over the five year specified system life of the freezer.

*Exhibit 7-12. Applying a Price-Related Factor.*

#### Calculating the Lowest Price Bid

Contracts may be awarded to more than one bidder when a solicitation contains many “line” items. This can happen when the IFB instructs bidders to submit separate prices for:

- Each line item—for the entire quantity specified in that line item,
- Specified lots of the same line item ("incremental" buys—e.g., when bidders are instructed to submit one price for the first 100 units, a second price for the next 500 units, and a third price for the final 500 units), or
- Specified groupings of line items ("family" buys).

Bidders can qualify their bids (e.g., they can stipulate that they will accept award only for all the items). This kind of bid is called an “all or none” bid. If the "all or none" bid is the lowest for all line items taken as a whole vs. any other combination of bids, award can be made to that bid.

The CO determines which award or combination of awards will be most favorable to the Government. For example, the CO may accept Bidder A’s low bid for line item 1, Bidder B’s low bid for line item 2, etc. A number of mathematical calculations might be performed to identify the most favorable award combinations, as illustrated in Exhibit 7-13.



### IDENTIFYING THE LOW BIDDER

To illustrate, assume the following bids:

Bidder	Item 1	Item 2	Total Bid
A	\$40,000	\$50,000	\$90,000
B	\$50,000	\$45,000	\$95,000

Bidder A's bid is the lowest total bid at \$90,000. However, if you award Item 1 to Bidder A and Item 2 to Bidder B, the two awards combined would total only \$85,000. Even after factoring in the additional \$500 cost of administering two contracts instead of one, multiple awards would be the better bet.

*Exhibit 7-13. Identifying the Low Bidder.*

#### Fair and Reasonable Prices

A CO may not make an award at any price that he or she does not believe to be “fair and reasonable.” The determination of what constitutes a fair and reasonable price is affected by such considerations as:

- Prices bid in previous procurements for like items, as adjusted for inflation and other such variables.
- Current market prices, conditions, and trends.
- The extent of competition and whether the competitors prepared their bids independently of one another.
- Opportunities for quantity discounts revealed by the bidder's responses to the provision at FAR 52.207-4, Economic Purchase Quantity—Supplies.

As a very general rule, a price is fair and reasonable if it is what a “prudent” person is willing to pay when buying under similar circumstances. See Exhibit 7-17 for a further discussion of “fair and reasonable.”

#### Options when Prices Appear Unreasonable

If the low bid appears unreasonably low, the CO next determines whether there has been a mistake in bid (see section 7.4.1.1). If the low bid appears to be unreasonably high, the CO next determines whether to cancel the IFB (see section 7.1.2.5).

## 7.2.5 Responsiveness

FAR 14.404-2

- Define responsiveness as it relates to bids.
- List examples of minor informalities and irregularities in bids.

### Definition

If a bid fails to conform to the essential requirements of the IFB, it is rejected as nonresponsive. Some examples include:

- Suppose that an IFB is for 1,000 widgets to be delivered no later than 15 January. Suppose further that the low bidder qualifies his or her bid to show delivery no later than 31 January. Because the delivery date is an essential requirement, the bid is rejected as nonresponsive.
- The bidder failed to use the electronic commerce method specifically stipulated or permitted by the IFB. The bid is nonresponsive.
- The electronic bid is unreadable. The bidder fails to provide clear and convincing evidence both (1) of the content of the bid as originally submitted and (2) that the bid is unreadable because of a Government software or hardware error, malfunction, or other Government mishandling. The bid is nonresponsive.

### Minor Informalities or Irregularities

FAR 14.405

A bid that is nonresponsive at the time of bid opening cannot later be made responsive; this prevents a bidder from having “two bites at the apple.” However, if there is a discrepancy that is considered a minor informality or irregularity, the bid can still be considered for award. A minor informality or irregularity is one that is merely a matter of form and not of substance. It is an immaterial defect that can be corrected or waived without being prejudicial to the other bidders.

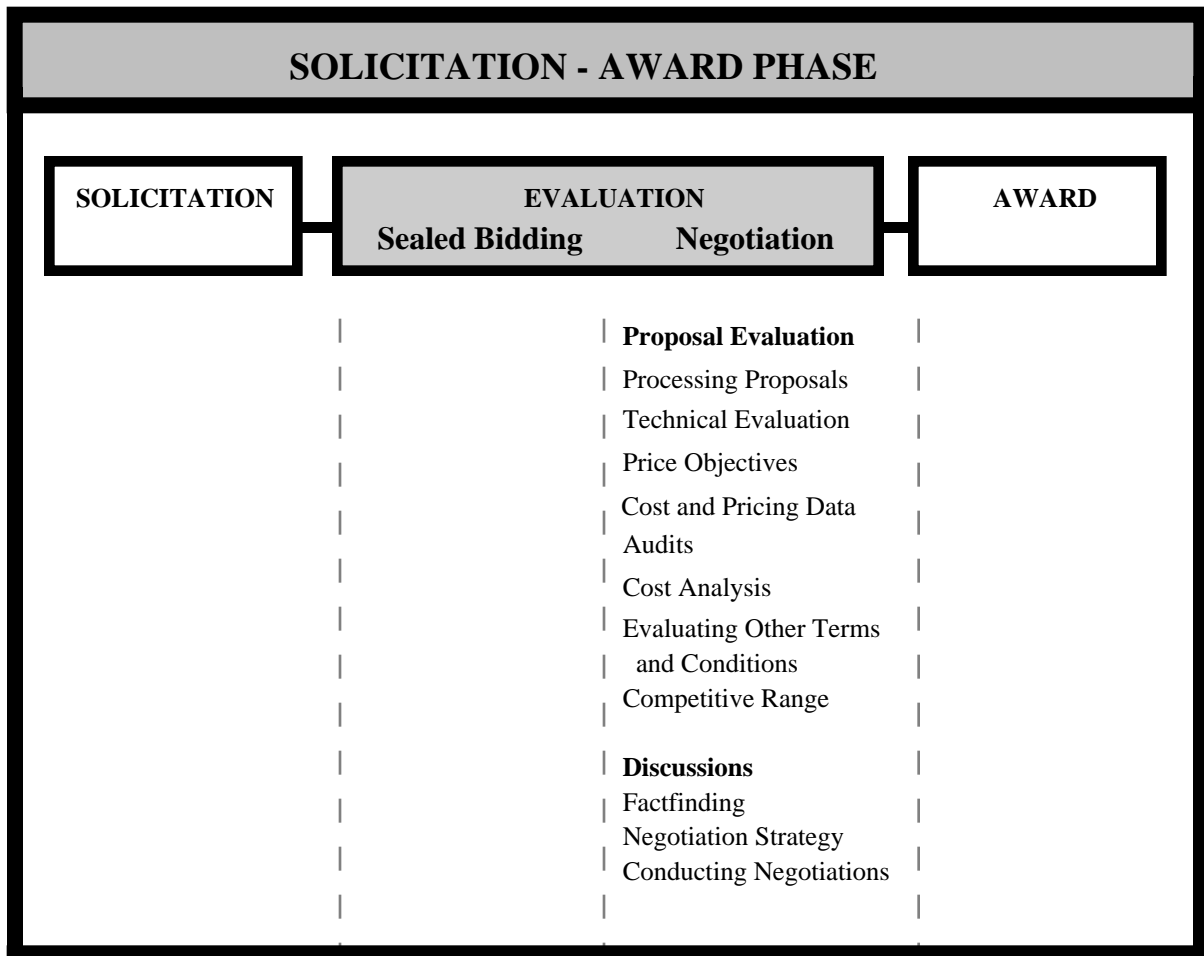
### MINOR INFORMALITIES OR IRREGULARITIES

Examples include failure of a bidder to:

- Return the number of copies of signed bids required by the IFB.
- Furnish required information concerning the number of its employees.
- Execute certain required certifications.

*Exhibit 7-14. Minor Informalities or Irregularities.*

### 7.3 EVALUATION (NEGOTIATION)



*Exhibit 7-15. Evaluation (Negotiation) (The Second Function of the Solicitation-Award Phase).*

**FAR Part 15**

This section addresses evaluating proposals, which is a part of the negotiation method of procurement.

**7.3.1 Proposal Evaluation****7.3.1.1 Processing Proposals**

FAR 15.411

Describe the following procedures for processing proposals:

- Receiving, securing, and controlling proposals.
- Opening and recording proposals.
- Processing late proposals.
- Comparing proposals with requirements of the RFP.
- Initiating proposal evaluation.

**Receipt and Opening**

Proposals received before the closing date are secured, unopened, in a locked file. Electronic offers are stored in a “secured restricted-access electronic offer box”. As soon as possible after the due date, the CO privately opens (i.e., not a “public” opening) and records the proposals. Late proposals are processed essentially the same as discussed under sealed bidding (7.2.3).

**Initial Review**

The CO compares the proposals with the requirements of the RFP to ensure that required information, certifications, etc., have been provided. If a proposal departs in any respect from the terms and conditions of the RFP, such variances must be identified and addressed in factfinding or discussions with the offeror. In some circumstances, the FAR even provides for rejection of a proposal if the offeror is unwilling to comply with provisions and clauses required for the acquisition (e.g., refusal to furnish the contingent fee representation prescribed in FAR 3.405).

**Initiating Evaluation**

Technical proposals are forwarded to the requiring activity or the technical evaluation team, as provided in the source selection plan. Price proposals are assigned for evaluation to specialists in the contracting office. If field pricing support or audit is required, copies of the proposals will be furnished to the cognizant organizations.

**7.3.1.2 Technical Evaluation**

- Identify the evaluation factors (technical and price) stated in the solicitation.
- List the Government sources available to assist the technical evaluators during the technical evaluation of a proposal.
- Identify who oversees evaluations to ensure conformance with the RFP, the Source Selection Plan, and the FAR.

## SOLICITATION AND AWARD PHASE

What is Evaluated	<p>During the technical evaluation of a proposal, evaluators must take into account the:</p> <ul style="list-style-type: none"><li>• Statement of Work (SOW) and related aspects of the Schedule.</li><li>• The solicitation's stated evaluation factors (e.g., UCF Section M), along with any special standards of responsibility.</li><li>• Instructions for proposal preparation (e.g., UCF Section L).</li><li>• Technical characteristics of supplies or services being procured.</li><li>• Offerors' proposals.</li></ul>
Who Evaluates	<p>The procedures for technical evaluation are contained in the Source Selection Plan, including the names of persons or organizations on the evaluation teams. In addition, the technical evaluators can (through the CO) seek help from other appropriate Government personnel. The technical evaluators analyze the recommendations from these sources and obtain other data necessary for the proposal evaluation.</p>

### **REASONS FOR THE TECHNICAL EVALUATION**

- Ensure understanding of the requirement.
- Establish the competitive range (see section 7.3.1.8).
- Rank proposals on the basis of non-price evaluation factors, such as past performance, and justify the rankings.
- Review the proposed labor mix, hours of direct labor, material mix and quantities, and the like, to support the CO's analysis of proposed costs (see section 7.3.1.6).
- Identify technical negotiation objectives and the need for factfinding.
- Prepare the agenda for discussions with the offerors.

*Exhibit 7-16. Reasons for the Technical Evaluation.*

Past Performance	<p>To evaluate past performance, COs start with the information on past performance provided by the offeror/quoter. Contracting officers also may obtain information on the past performance of a firm from sources other than that firm. This includes any source (public or private sector) known to the Government. In particular, obtain information from Government contracting activities that have evaluated an offeror's performance as prescribed in FAR Part 42.15.</p>
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When evaluating past performance information, consider such issues as:

- The number and severity of an offeror's problems,
- Effectiveness of corrective actions taken by the offeror,
- The offeror's overall work record.
- Age and relevance of past performance information.

#### CO's Role

Generally, the CO ensures that the evaluation process conforms with the RFP, the Source Selection Plan, and agency source selection procedures. Sometimes, however, when formal procedures are used, a Source Selection Authority may be appointed and might assume some oversight responsibilities for managing the evaluation process.

#### 7.3.1.3 Price Objectives

15.8

- Define the term price objective.
- State the issues considered when analyzing price proposals to determine (a) a fair and reasonable price and (b) the Government's price prenegotiation objectives.

Before beginning negotiations with an offeror, the CO establishes a price objective, i.e., the "going-in" or prenegotiation position on price. To establish the Government's position on what constitutes a fair and reasonable price for the procurement, the CO compares proposed prices to such indicators of reasonableness as:

- Prices offered and paid in past procurements for the same or a similar deliverable(s), with adjustments for such factors as inflation.
- Prices offered and currently being paid in other procurements.
- Rough "yardsticks" (such as dollars per pound).
- Published price lists, published market prices, and price indices.
- Independent Government estimates of cost and value.
- Prices for the same or similar items obtained through market research

When the CO does not have sufficient data to evaluate the overall proposed price, the CO may need to analyze the individual elements of cost that comprise the proposed price. This may entail:

- Obtaining cost and pricing data (see Section 7.3.1.4).
- Auditing the cost data (see Section 7.3.1.5).
- Developing a prenegotiation position on each significant proposed element of cost (see Section 7.3.1.6).

### WHAT IS A “FAIR AND REASONABLE” PRICE?

In pricing a contract, the CO’s most important objective is to balance the contract type, cost, and profit or fee negotiated to achieve a total result and price **fair and reasonable** to both the buyer (i.e., the Government) and the seller (i.e., the contractor).

“Fair to the buyer” means a price that is in line with (or below) either of the following.

- The fair market value of the contract deliverable. “Fair market value” is the price that you **should** expect to pay, given the prices of bona fide sales between informed buyers and informed sellers under like market conditions in competitive markets for deliverables of like type, quality, and quantity.
- The (1) total allowable cost of providing the contract deliverable that would have been incurred by a **well managed, responsible firm using reasonably efficient and economical methods** of performance + (2) a reasonable profit.

Can a firm fixed price be considered “fair” even if the seller’s actual costs exceed the price? Yes, if the high costs result from slipshod management, obsolete tooling, and other such causes. The question is how the firm fixed price compares to what the work ought to have cost.

“Fair” to the seller means a price that is realistic in terms of the seller’s ability to satisfy the terms and conditions of the contract. Why should the CO care if a low offer is realistic? Because an unrealistic price puts both parties at risk. The risk to the Government is that the seller — to cut its losses — might:

- Cut corners on product quality
- Deliver late
- Default, forcing a time-consuming reprocurement
- Refuse to deal with the Government in the future
- Be forced out of business entirely

*Exhibit 7-17. What is a Fair and Reasonable Price?*

## CHAPTER 7

### 7.3.1.4 Cost and Pricing Data

FAR 15.8

- Describe cost and pricing data
- List conditions under which the firm must certify the data.
- Identify the circumstances that determine if an offeror is exempt from submitting cost and pricing data.

#### Obtaining Data

FAR 15.804-6(a)

To obtain a cost breakdown, the contracting officer must specify:

- Whether **complete** cost or pricing data must be provided (i.e., "all facts as of the date of price agreement that prudent buyers or sellers would reasonably expect to affect price negotiations significantly"),
- What data must be provided if complete data are not necessary,
- The form in which the data must be submitted, and
- Whether the data must be certified.

When required under FAR 15.804-2 (see Exhibit 7-18), firms must submit complete data and "certify" that the data were **accurate**, **current**, and **complete** as of the date on which the Government and the firm concluded price negotiations and reached agreement on the price. For this purpose, the firm must sign and submit a "Certificate of Current Cost or Pricing Data". If the firm's certification later proves false, the Government might be entitled to a price reduction (see section 8.3.2.3) for the defective data.

COs only request certified cost or pricing data as a last resort in cost and price analysis. The FAR prohibits obtaining cost or pricing data if an exception applies, and encourages a waiver in the event that an exception does not apply - if price reasonableness can be determined without resorting to certified data.



<b>COST AND PRICING CERTIFICATES</b> <b><u>FAR 15.804</u></b>	
Required When:	Unless The Award Price Is Based On:
A negotiated contract action exceeds \$500,000 (however, a CO may request it at lower dollar levels), <b>OR</b> A modification to a sealed bid or negotiated contract involves a price adjustment that is expected to exceed \$500,000.	"Adequate" price competition <b>OR</b> An established catalog or market price for a commercial item sold in substantial quantities to the general public <b>OR</b> Prices set by law or regulation.

*Exhibit 7-18. Cost and Pricing Certificates.*

If cost or pricing data are not required because an exception applies, or an action is at or below the cost or pricing data threshold, COs are required to analyze prices to determine price reasonableness and cost realism. Only to the extent necessary to make such determinations, COs may require offerors/quoters to submit information to support their price proposals (including information on such elements of cost as direct labor hours, wage rates, and direct material costs). For instance, such information may be necessary for sole source negotiations under the dollar threshold for certification.

### 7.3.1.5 Audits

- Define an audit.
- State reasons why an audit may be necessary.
- State the general procedures taken when an audit is necessary.

#### Definition

To audit means to review a company's accounting procedures, accounting practices, books, records, documents, and other evidence related to (a) cost or pricing data or (b) costs claimed to have been incurred or anticipated to be incurred in performing a contract. Audit reports include findings on such matters as:

- The firm's basis and method for estimating costs.
- The accuracy, completeness, and currency of submitted cost or pricing data.

FAR 15.805-5

- Additional cost or pricing data of relevance to the proposal.
- The dollar impact of technical analyses received by the auditor.
- The adequacy of the offeror's estimating methods and accounting systems.

FAR 15.803

An auditor's recommendations and counsel are advisory only. CO's are solely responsible for the final pricing decision.

#### When to Audit

CO's request the help of auditors when data on hand are not sufficient to establish prenegotiation objectives. The audit may be performed by the agency's own auditors or by arrangement with such activities as the Defense Contract Audit Agency. The CO reviews the audit report, resolves questions on the audit with auditors, and applies the auditor's findings in developing prenegotiation objectives. When requesting an audit, the CO should ask the audit office to determine whether audits completed during the preceding 12 months addressed certain cost elements, i.e. indirect costs. If so, the CO should not request a new audit of the proposed costs if the information from the prior audits is adequate for determining the reasonableness of such costs.

#### 7.3.1.6 Cost Analysis

FAR 15.805-3

- Define cost analysis.
- Identify typical elements of cost.
- Identify when cost analyses are necessary.

#### Definition and Elements

Cost analysis is the review and evaluation of the separate cost elements and proposed profit that factor into the proposed price. Drawing in part on the technical evaluation of such matters as proposed quantities and on the audit report, the CO may establish prenegotiation objectives for the following elements of cost.

- Direct materials (quantity and price).
- Direct labor (quantity and rates).
- Indirect costs (e.g., Overhead and General and Administrative).
- Subcontracts.
- Other direct costs (e.g., Travel and Royalties).
- Profit or fee.

## Purpose and Application

FAR 15.803

The central issue, in cost analysis, is whether a proposed cost is realistic—assuming reasonable economy and efficiency—and otherwise allowable (see Chapter 8, Exhibit 8-12). The FAR, however, cautions against preoccupation with any one element of cost or believing that an agreement must be reached on every individual element. In negotiated procurements, the ultimate goal is an agreement on an overall price (or total estimated cost) and related terms and conditions (e.g., contract type and/or profit/fee) that, taken as a whole, is fair and reasonable to both parties.

### 7.3.1.7 Evaluating Other Terms & Conditions

- Identify terms and conditions other than technical and price that may be the subject of negotiations.

Offerors may present counterproposals on various terms and conditions of the RFP. For example, an offeror may propose that the Government:

- Use a different type of contract than solicited.
- Provide financing.
- Furnish property for the contract.
- Lease rather than purchase.
- Extend the proposed delivery schedule.

COs evaluate such counterproposals, both to establish the competitive range and prepare negotiation objectives and strategies.

### 7.3.1.8 Competitive Range

- State the purpose of establishing a competitive range.
- State the criteria for determining a competitive range.
- State the impact of not establishing a competitive range.

## Purpose and Criteria

FAR 15.609

After proposals have been evaluated and rated, the CO establishes a competitive range to determine which proposals warrant further consideration. The CO uses evaluation results (price and other factors) to establish the range. This procedure might be viewed as a process of elimination leading toward source selection. The CO conducts written or oral discussions with all offerors in the competitive range.

Failure to include potential “awardees” in the competitive range may deprive the agency of the opportunity to contract with a desirable source at a favorable price. Also, the excluded offerors may have grounds for a successful protest. On the other hand, the failure to properly exclude

## Impact

or eliminate unsuccessful sources from the competitive range unnecessarily prolongs discussions and puts an undue burden on evaluators. This wastes Government and offeror resources and falsely indicates to those offerors that they have a chance of being awarded the contract.

## FAR 15.607

In lieu of setting a competitive range, the contracting officer may elect to award without discussions (a) if the solicitation provided for this possibility, (b) no discussions are held with any offeror, (c) the proposal in line for award meets the test of responsiveness, and (d) award would be at a fair and reasonable price. Under those circumstances, the CO can award without discussions even in “greatest value” competitions and trade-off the costs of conducting discussions against the possibility of seeing some slight improvement in best and final prices in relation to those initially proposed.

## 7.3.2 Discussions

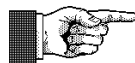
## 7.3.2.1 Factfinding

## FAR 15.807(a)

## Definition

- Define factfinding.
- List elements that may emerge during a factfinding session with an offeror.

Factfinding is the process of identifying and obtaining information necessary to complete the evaluation of proposals. Factfinding can be performed using several methods (e.g., telephone calls, letters, conferences, and/or site visits).



For example suppose an offeror states that its product will be “waterproof to a depth of 100 feet,” as required by the specification. In order to determine the validity or credibility of the offeror’s proposal, the CO would ask for engineering data to show how the waterproofing will be accomplished.

## Outcomes

After conducting a factfinding session, the CO determines whether there is a need to:

- Obtain additional information from the offeror.
- Revise prenegotiation objectives.
- Eliminate the proposal from the competitive range.

## Factfinding vs. Negotiations

The CO arranges for factfinding sessions, if required. The CO must ensure that factfinding sessions do not become negotiation or discussion sessions. Negotiation sessions are held later with offerors whose proposals are in the competitive range.

### 7.3.2.2 Negotiation Strategy

- State several negotiation strategies and tactics.

#### Basis for the Strategy

When negotiations are necessary, the CO prepares a negotiation plan that includes prenegotiation objectives and strategies for attaining them, based on information taken from sources such as the:

- RFP.
- Proposal.
- Factfinding results.
- Field pricing report, including any audit findings.
- Independent Government cost estimate.
- Technical evaluation.
- Acquisition histories and market research.

#### Typical Strategies

The plan will include negotiation tactics and strategies such as:

- Assigning roles to members of the Government's negotiation team. For example, use engineering, accounting, and legal personnel to address critical issues involving their expertise.
- Opening negotiations with preplanned positions designed to achieve negotiation objectives.
- Using preplanned counter-offers to work toward your objectives.
- Offering concessions of lesser value in exchange for concessions that are of greater value to the Government.

The plan should also address the offeror's likely strategies and potential counters.

### 7.3.2.3 Conducting Negotiations

FAR 15.610

- Briefly explain what takes place during a negotiation session.
- List examples of restrictions on negotiation sessions.
- List what goes into a price negotiation memorandum when a selection for award decision is made (negotiation).

The CO develops an agenda for each negotiation. The agenda is designed to achieve the presolicitation objectives using the already planned negotiation strategies.

## CHAPTER 7

### Conducting Discussions

The CO develops an agenda for each negotiation. The agenda is designed to achieve the presolicitation objectives using the already planned negotiation strategies.

True negotiation includes bargaining. Both parties, the Government and the offeror, establish their objectives and enter into the negotiations with the expectation of bargaining to achieve those objectives.

Both negotiation teams have a leader, with the CO as the Government leader. Typically, the CO establishes the agenda because, as the buyer, the Government is raising questions about the seller's offer. The CO follows the agenda and uses the negotiation strategy. Caucuses may be used as necessary so that either party can privately discuss an issue needing resolution or a change in objectives.

### Non-Competitive Negotiations

In a non-competitive procurement, the CO will conduct negotiations with the contractor until a favorable agreement (best case) or an acceptable agreement (not necessarily favorable) is reached. However, the Government is not obliged to reach agreement if an acceptable agreement is not possible.

### Competitive Discussions

In competitive procurements, discussions are conducted with each offeror in the competitive range. During such discussions, the CO must impart enough information to afford the offeror a fair and reasonable opportunity to identify and correct deficiencies in its proposal. At the conclusion of discussions, the offerors are asked to submit a "best and final offer" (BAFO). If the discussions have been successful, one or more of the offerors will submit a BAFO that meets the highest expectations of the Government (e.g., a superior technical proposal at a competitive price).

The nature of bargaining differs greatly between non-competitive and competitive negotiations. Instead of attempting to reach mutual agreement and finalize a deal, the CO's primary goal in competitive discussions is to *persuade* each offeror to submit a BAFO that represents an improvement over the earlier proposal. The CO hopes any revisions will more likely satisfy the government's requirements and be closer in price to what the CO believes is fair and reasonable.

However, offerors are free to remove themselves from consideration, make no changes at all in their BAFO, or make changes that have no relationship whatsoever to the discussions. On the other hand, there is nothing to prevent the government from obtaining informal agreement on contract terms and conditions with the expectation that the BAFO will reflect the results of the discussion.

Restricting  
Discussions

There are several restrictions on conducting competitive discussions; some are listed in Exhibit 7-19.

Documenting  
Discussions

FAR 15.808

The CO documents discussions in a Price Negotiation Memorandum. Include such information as the purpose of the negotiations, identity of Government and contractor representatives, extent of reliance on certified cost and pricing data, basis for any waiver of cost and pricing data, summary of the contractor's proposal and the Government's prenegotiation positions, and the most significant facts or considerations in the establishment of prenegotiation positions on price and the negotiated price.

### **CAVEATS FOR COMPETITIVE DISCUSSIONS**

**FAR 15.610**

- Never indicate to offerors they will win the award.
- Never give one offeror an advantage by disclosing information about other offerors' prices or technical proposals.
- Never cite non-existent regulations or make false statements.
- Never disclose the Government cost estimate.
- Never allow team members to disagree (unless planned) during negotiations.
- Never allow deadlines to affect the course of negotiations.
- Do not use the same strategies/tactics all the time.
- Do not engage in technical leveling or transfusion.\*
- Do not use auction techniques. \*

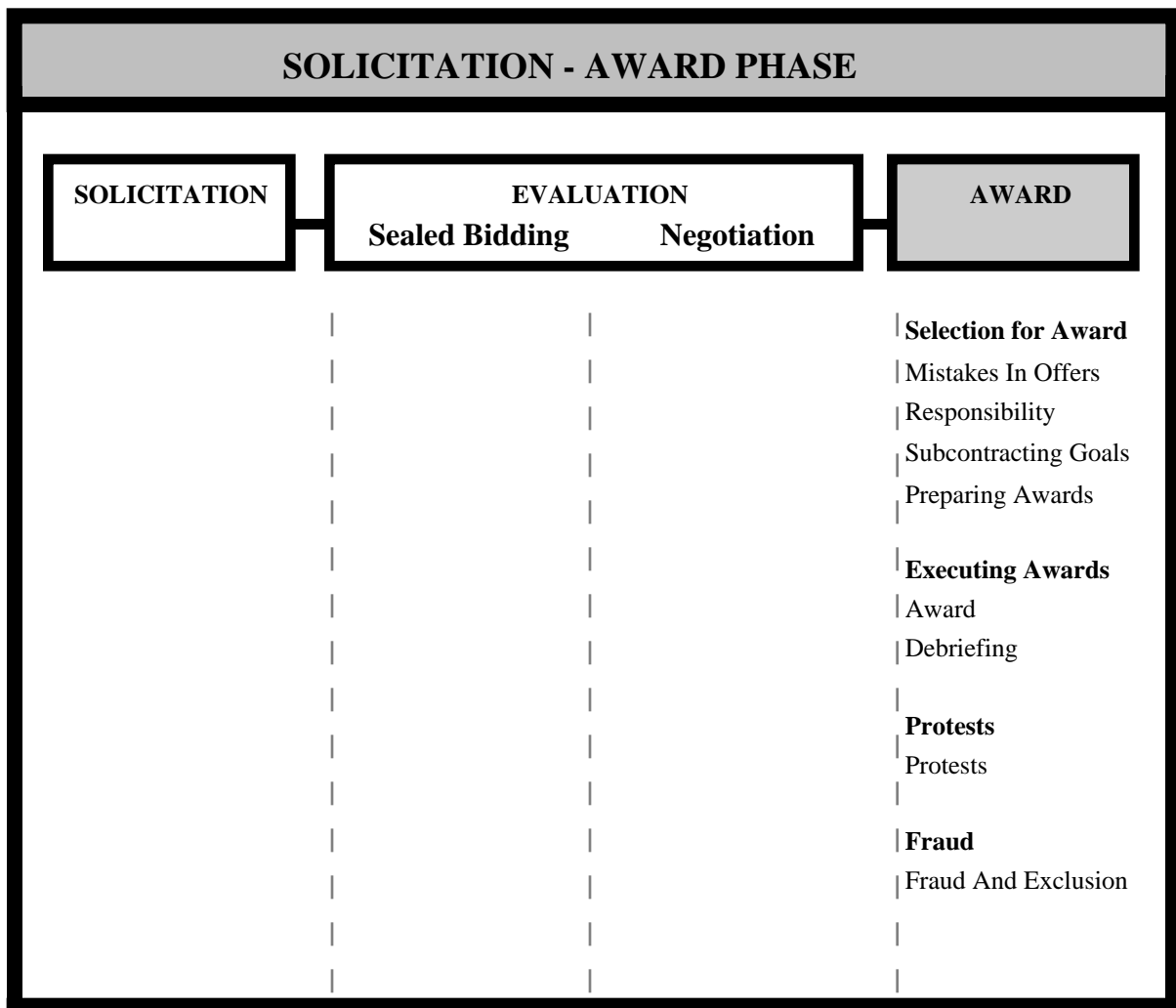
*Exhibit 7-19. Negotiation Caveats.*

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\*“Auction” techniques include (1) indicating to an offeror a cost or price that must be offered to receive further consideration, (2) advising an offeror of its price standing relative to another offeror, and (3) otherwise furnishing information about other offerors' prices. “Technical Leveling” means helping an offeror bring its technical proposal up to the level of other proposals through successive rounds of discussion. “Technical Transfusion” means disclosing technical information supplied by one offeror to other offerors.



## 7.4 AWARD



*Exhibit 7-20. Award (The Third Function of the Solicitation-Award Phase).*

Award is the third and final function of Phase 2, (the “Solicitation and Award Phase”), of the Federal Acquisition Process. When studying contract award, you will recognize that some procedures vary depending on whether the contract results from sealed bidding or negotiation procedures.

## 7.4.1 Selection for Award

### 7.4.1.1 Mistakes in Offers

- List potential mistakes in offers.
- State an example of how a mistake in bid or proposal may be resolved.

#### The Nature and Harm of Mistakes in Offers

FAR 15.607

Unfortunately, offerors often err in estimating costs and calculating a proposed price. In contracting by negotiation, mistakes in proposals that surface before award tend to have little impact because:

- Discussions are permitted, and
- The offeror can correct mistakes or withdraw the proposal at any time before award.

FAR 14.406

Preaward mistakes in sealed bidding are of more concern because discussions are prohibited and a bid ordinarily cannot be changed or withdrawn after bid opening — it is firm until the time for acceptance has elapsed. Of equally grave concern are mistakes in either bids or proposals alleged after award.

On the one hand, the Government must avoid giving the offeror "two bites at the apple," to the detriment of the rights of other offerors and the integrity of the Federal acquisition process. On the other hand, ignoring genuine mistakes might :

- Force the awardee to work at a significant risk of losing money (with a correspondingly high risk of default or unacceptable performance), while
- Denying award to offerors who prepared (often at great expense) legitimate offers—which, in the long run, would tend to discourage them from pursuing Government contracts.

For these reasons, the FAR establishes procedures for (1) reviewing offers for mistakes and (2) resolving mistakes alleged by contractors.

#### Identifying Potential Preaward Mistakes

When reviewing offers, look for:

- Apparent clerical mistakes, such as a missing decimal point.
- Potential non-clerical mistakes, such as a price that is so much lower than other offers or your own estimate, based on market research, as to indicate the possibility of error.

If you find potential mistakes , ask the offeror to verify the offer.

## Resolving Mistakes

Based either on a call from the CO to verify an offer or upon his/her own independent review of the offer, an offeror may allege a mistake.

If an offeror alleges a mistake prior to award in a negotiated acquisition, the “mistake” would become a matter for discussion and presumably would be rectified in the firm's best and final offer.

If a bidder alleges a mistake prior to award in sealed bidding, the bidder must request permission from the CO to correct or withdraw the bid. The CO in turn may reject the request and hold the bidder to the bid. The CO may do otherwise only when:

- The mistake is alleged in writing.
- Evidence of the mistake is clear and convincing.

If, regardless of the method of procurement, a contractor alleges a mistake in its offer after award, the contractor must request either that the contract be rescinded (i.e., terminated) or reformed (i.e., modified). The CO in turn may reject the request and hold the contractor to the awarded contract. The CO may do otherwise only when:

- The mistake is alleged in writing.
- Evidence of the mistake is clear and convincing.
- The mistake was so apparent as to have charged the CO with notice of the probability of a mistake.

## Constraints on the CO's Authority to Resolve Mistakes

Other than for preaward mistakes in negotiated acquisitions, the CO's options are constrained by such considerations as whether:

- The offeror's intended price can be calculated from available evidence.
- The intended price would have been lower than the next lowest offer in line for award.

Moreover, the CO may need to obtain approval for any proposed resolution of the mistake from a higher level (e.g., from the agency head or designee if the decision is to permit withdrawal of a bid after opening).

### 7.4.1.2 Responsibility

#### FAR 9.1

- Define responsible offeror.
- List the general standards of contract responsibility.

**Definition and Standards** A “responsible offeror” is an offeror that satisfies all of the standards listed in Exhibit 7-21:

#### RESPONSIBILITY STANDARDS

##### FAR 9.104

- Adequate financial resources.<sup>1</sup>
- A satisfactory performance record.
- Ability to perform the work/services required by the contract within the required delivery schedule.
- A satisfactory record of integrity and business ethics.
- The necessary organization, experience, accounting and operational controls, and technical skills.<sup>1</sup>
- The necessary production, construction, and technical equipment and facilities.<sup>1</sup>
- Qualified and eligible to receive an award under applicable laws and regulations.
- Any special standards stated in the solicitation.

*Exhibit 7-21. Responsibility Standards.*

#### Award Only to Responsible Firms

Awarding solely on the basis of lowest evaluated price can be false economy if there is a substantial risk of subsequent default, late deliveries, or performance that is otherwise unsatisfactory. CO's are therefore not required to award to a supplier solely because that supplier has submitted the lowest price. Rather, CO's may award only to firms that have affirmatively demonstrated their responsibility and, when necessary, the responsibility of proposed subcontractors. (In practice, the CO's signature on a contract constitutes a determination that the prospective contractor is responsible with respect to that contract.)

For a small business concern, if the CO determines that it is not responsible, the matter is referred to the Small Business Administration for a final decision.

<sup>1</sup>Or the ability to obtain them.

### Obtaining Information on a Firm's Responsibility

The CO first checks the “List of Parties Excluded From Government Procurement Programs,” to determine whether a contractor is debarred, suspended, or otherwise ineligible to receive a Government contract. If the concern has not been excluded, the CO next reviews data on the firm's responsibility from the offer, acquisition histories, and market research. If the CO, after such research, lacks the data to affirm the offeror's responsibility, the CO may ask the cognizant contract administration activity to perform a preaward survey of a prospective contractor's capability to perform the proposed contract. COs should not request preaward surveys if the contemplated contract involves the acquisition of commercial items, unless circumstances justify the cost.

Among other things, CO's must consider relevant past performance information collected by Government contracting activities during contract administration. However, a potential contractor can not be considered nonresponsible solely on the basis of a lack of relevant performance history, unless relevant experience was established in the solicitation as a "special standard of responsibility". FAR 9.104-1(c) & FAR 42.15

#### 7.4.1.3 Subcontracting Goals

- List the goals of the subcontracting plan and explain the purpose of having goals.
- State the threshold and the criteria for when a subcontracting plan is required.

#### FAR 19.7

### Goal of Subcontracting Plans

A goal of the Federal acquisition process is to provide contracting opportunities for small and small/disadvantaged business concerns. Because prime contractors award substantial numbers of subcontracts, it is Government policy that prime contractors provide subcontracting opportunities to small and small/disadvantaged business concerns. This policy is put into effect by certain clauses that are included in government contracts and subcontracts.

In some procurements, the apparently successful offeror is required to submit a subcontracting plan. The plan describes how the offeror will provide subcontract opportunities to small, small/disadvantaged, and women-owned small businesses.

### Requirement for Subcontracting Plans

Subcontracting plans are required if the contract action is expected to exceed \$500,000 (\$1,000,000 for construction), and the contract is expected to result in subcontracting opportunities.

Subcontracting plans are not required when:

- The prime contract is awarded to a small business concern.
- The contract is for personal services.
- The contract is to be performed outside the US.

#### **7.4.1.4 Preparing Awards**

- List the reasons for making or recommending award when contracting by sealed bidding, and when contracting by negotiation.

#### **Recommending Award in Sealed Bidding**

When contracting by sealed bidding, the CO selects or recommends a bidder for award based on the price and price-related factors stated in the IFB. In selecting the awardee, the CO ensures:

- All requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met.
- Multiple award and equal low bid procedures, if applicable, were handled correctly.
- Sufficient funds are available for obligation.

#### **Recommending Award in Competitive Negotiations**

When contracting by negotiation, the CO selects, or recommends to the Source Selection Official, an offeror for award. In selecting the awardee, the CO ensures:

- Evaluation factors (only those factors stated in the RFP) have been properly considered.
- Scores or ratings of the competing proposals have been arrived at according to the selection plan.
- The competitive range was fairly established.
- All requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met.
- The offer selected for award represents the best value for the Government, in terms of the RFP's evaluation factors.
- Sufficient funds are available for obligation.

**Preparing the Contract** For both methods of contracting, documentation should be sufficient to allow accurate reconstruction of the procurement for immediate review and for future reference. Drawing on that documentation, the CO must prepare a contract for execution that establishes a legal and binding agreement (e.g., offer, acceptance, consideration, competent parties, lawful purpose, and certainty of terms). When soliciting sealed bids, incorporate the bid and all clauses from the IFB, including any amendments to the IFB, in the contract. In negotiated acquisitions, the contract must accurately convey that which was contemplated by the parties, as reflected in the RFP (including any amendments thereto) and the best and final offer.

When awarding a Purchase Order against an RFQ, the CO ensures:

- That all terms and conditions from the RFQ are incorporated
- Determines whether to require written acceptance of the order by the vendor prior to performance.
- Completes the order, i.e. FACNET or written
- Issues the order, i.e mail or electronically
- Documents the award (keeping documentation to a minimum)

## **7.4.2 Executing Awards**

### **7.4.2.1 Award**

- List the steps in preparing and awarding a contract using both sealed bidding (including use of SF 26 and SF 33) and negotiation.

**Executing the Contract** Contracts may be awarded by signing the contract itself or by issuing a Notice of Award. (Note that only a duly appointed CO, acting within the scope of his or her authority, may sign a contract). Award is usually made by (the CO) signing the award portion of the Standard Form 33, “Solicitation, Offer and Award.”

If, however, an offer is changed so that it results in the need for a new, bilateral award document, the SF 26 “Award/Contract” is normally used, and both the offeror and the CO sign it. In some circumstances, such as contracting for construction, other forms may be required.

If the award is for commercial items, the CO is required to sign the SF 1449.

## CHAPTER 7

### Notification and Distribution

The CO may also be required to notify:

- Unsuccessful offerors.
- SBA, the Department of Labor, and other such Government agencies.
- The public at large, through a CBD synopsis of the award and other announcements.
- The Federal Procurement Data System.

Copies of the signed contract are typically distributed to the contractor(s) within three days and also to the paying office, contract administration activities, audit services, and other such parties. CO's can use electronic rather than paper medium to transmit preaward, postaward and award notices.

#### 7.4.2.2 Debriefing

##### Definition

**FAR 15.1003**

- Define debriefing.
- Explain how an unsuccessful offeror is debriefed.

Debriefing means informing unsuccessful offerors of the basis for the selection decision and contract award, when the contract was awarded on a basis other than price alone. Debriefing is therefore only held when award has been made through competitive negotiation procedures. Successful offerors may also request debriefings whenever award is on the basis of competitive proposals.

The CO debriefs offerors who ask, in writing, for the debriefing. During debriefings, share your evaluation of the significant weaknesses or deficiencies in the offeror's proposal, in addition to:

- The overall evaluated cost to the Government and technical rating of the successful offeror and the debriefed offeror, if applicable.
- The overall ranking of all offerors when any ranking was developed by the agency during the source selection
- A summary of the rationale for award
- For commercial items delivered under the contract, the make and model of the awardee's deliverable
- Reasonable responses to relevant questions about whether the Government properly observed the source selection procedures prescribed by the solicitation, applicable regulations, and other applicable authorities.



On the other hand, COs must withhold information that is not releasable under the Freedom of Information Act, such as:

- Trade secrets.
- Confidential manufacturing process and techniques.
- Confidential financial information (including profit, indirect cost rates, and cost breakdowns).

### 7.4.3 Protests

FAR 33.1

- Define the terms protest and interested parties.
- List the protest forums to which a protest may be submitted.
- List the various bases on which protest are submitted.

#### Definitions

A protest is a written objection by an interested party to a: (1) solicitation for the acquisition of supplies or services (including cancellations of solicitations), or (2) proposed award or the award of such a contract. Interested parties also may protest cancellation or termination of award, if the protester alleges in writing that the termination or cancellation is based in whole or in part on improprieties concerning the award.

An interested party is an actual or prospective offeror whose direct economic interest would be affected by the award of a contract, or the failure to award a contract.

#### Protest Forums

If the CO knows that an interested party intends to file a protest, the CO encourages the party to seek resolution within the agency (e.g., by using an "alternate dispute resolution" procedure). Otherwise, the interested party may pursue a protest with:

- The Comptroller General (GAO).
- SBA, for protests of an offeror's eligibility for set asides.
- U.S. Courts.

#### Reasons for Protests

There are numerous reasons why an interested party may file a protest. For example, the interested party may allege that:

- Specifications are unduly restrictive.
- A "late" bid or "nonresponsive" bid was accepted.
- It was improperly excluded from the competitive range.
- Award was improperly made.
- The awardee is not responsible.

## CHAPTER 7

Impact on the Acquisition	<p>Impact varies with the protest forum. For instance, pending the Comptroller General's review of a protest, COs generally:</p> <ul style="list-style-type: none"><li>• Delay award, when notice of the protest arrives prior to award.</li><li>• Suspend or terminate award, if the notice comes within 10 calendar days after award.</li></ul> <p>After reviewing the protest, the Comptroller General may recommend such actions as cancellation and resolicitation. The Comptroller General may also recommend award of protest costs, such as the costs of:</p> <ul style="list-style-type: none"><li>• Filing and pursuing the protest, and</li><li>• Bid or proposal preparation.</li></ul>
<b>7.4.4 Fraud</b>	<ul style="list-style-type: none"><li>• Define the term fraud.</li><li>• Identify indications that fraud or other civil or criminal offenses by a contractor or Federal personnel have occurred.</li></ul>
Definition	<p>Fraud is a felonious act of corruption, or an attempt to cheat the Government or corrupt its agents.</p>
Fraud Indicators	<p>Examples of indicators of fraud on the part of Government personnel:</p> <ul style="list-style-type: none"><li>• Improper disclosure of information on pending or ongoing procurements.</li><li>• Slanting specifications to the products or capabilities of a single contractor without adequate justification for such slanting.</li><li>• Splitting requirements to get under the small purchase threshold.</li><li>• Falsified statements in sole source recommendations.</li></ul> <p>Examples of indicators of fraud and other improper conduct on the part of contractors:</p> <ul style="list-style-type: none"><li>• Bid suppression or limiting, complementary bidding, bid rotation, or market division.</li><li>• Bribes and gratuities.</li><li>• False invoices and cost mischarging.</li><li>• Falsification of Government furnished property records.</li><li>• Failure to update cost or pricing data upon receiving information that prices have decreased.</li></ul>

## SOLICITATION AND AWARD PHASE

Reporting Fraud	If you find any such indication of fraud or other improper conduct on the part of a contractor, or Government personnel, report all relevant data to the agency's Inspector General to other relevant Government officials, as provided in your agency's procedures.
Potential Impact on the Firm's Eligibility for Awards	Prospective contractors who are convicted of fraud, or who have seriously violated the Government contract(s) or subcontract(s), may be excluded from receiving a Government contract. Performance problems may also be a basis for exclusion (see Section 8.2.1.4). COs refer to "List of Parties Excluded From Government Procurement Programs" to determine whether an offeror is debarred, suspended, proposed for debarment, or otherwise excluded from contracts.

